No. 83-334

In the Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL., APPELLANTS

v.

LEILA G. BROWN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION OF THE UNITED STATES TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court did not clearly err in finding that the Alabama legislature in 1876 adopted an at-large system for electing members to the Mobile County School Board with the discriminatory intent to dilute black voting strength.

2. Whether the court of appeals correctly held that the district court did not clearly err in finding that the at-large system for electing school board members has been maintained by the State and County with the discriminatory intent to dilute black voting strength.

3. Whether the court of appeals correctly held that the district court did not clearly err in finding that the at-large electoral system for the County's school board has the present effect of diluting black voting strength.

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The Solicitor General, on behalf of the United States, moves, pursuant to Supreme Court Rule 16(1)(c), that the judgment of the court of appeals in this case be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-9a) is reported at 706 F.2d 1103. The opinion of the district court (J.S. App. 1b-58b) is reported at 542 F. Supp. 1078. That opinion incorporates findings made in a previous opinion by the district court, which is reported at 428 F. Supp. 1123.

JURISDICTION

The order of the court of appeals was entered on June 20, 1983. The notice of appeal (J.S. App. 1c-2c) was filed on July 5, 1983, and the jurisdictional statement was docketed on August 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

1. Mobile County is located in southwestern Alabama; it borders the State of Mississippi and the Gulf of Mexico (428 F. Supp. 1123, 1126). The County covers an area of 1240 square miles (*id.* at 1142) and has a population, according to the 1970 Census, of 337,200, of whom 32.5% are black (*id.* at 1126).

Under a statute first adopted by the Alabama legislature in 1876, and amended in 1919, the Board of School Commissioners of Mobile County (Board) consists of five members elected at-large (J.S. App. 7b). There is no requirement that a candidate for commissioner reside in any particular part of the county, but candidates must run for numbered posts and are elected on a staggered basis every two years for a six-year term (*ibid.*). There is a majority vote requirement for primary elections for the County Board (428 F. Supp. at 1142), but no majority vote requirement in the general election.[1]

2. In 1975, ten black residents of Mobile County, who represent a class of all black citizens living in the County, filed this suit in the United States District Court for the Southern District of Alabama against the Board and various County elected officials (J.S. App. 2a). The plaintiffs claimed that the Board's at-large election system impermissibly diluted their voting strength in violation of the Fourteenth and Fifteenth Amendments to the Constitution and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (J.S. App. 2a). Plaintiffs requested an injunction against at-large elections for the office of school commissioner of the County; they sought an order that Board members be

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[1]Historically, it is quite rare for more than the two major party candidates to run in the general election. Therefore, almost every candidate who has been elected has received a majority of the votes cast (*ibid.*).

elected in the future from properly apportioned, racially nondiscriminatory single-member districts. 428 F. Supp. at 1125.

After a trial, the district court found for plaintiffs. 428 F. Supp. at 1142-1143. The court rejected the County's argument that the Fourteenth Amendment required proof of discriminatory purpose either in the creation or retention of the at-large electoral system; instead, it held that a violation was adequately proved by plaintiffs' evidence that the effect of the at-large system was to minimize or cancel out the voting strength of blacks in the County (428 F. Supp. at 1142).

As a remedy for the constitutional violation, the district court adopted a plan which divided the county into five single-member districts, two of which contained populations which were majority black (J.S. App. 2a). On appeal, the Fifth Circuit affirmed summarily. 575 F.2d 298 (1978). This Court noted probable jurisdiction over the County's appeal, and after hearing oral argument, the Court vacated the judgment of the courts below and remanded for further proceedings in light of the decision rendered that same day in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). *Williams* v. *Brown*, 446 U.S. 236 (1980).

After the case was remanded to the district court, the United States intervened as a party-plaintiff (J.S. App. 2a). The district court conducted a hearing to allow the parties to supplement the record. Based on the evidence from both the first trial and the supplemental hearing, the district court again entered judgment against the County (*id.* at 1a-2a). The court recognized that, under this Court's decision in *Bolden*, "an intent to discriminate is a necessary element of a violation of the fourteenth and fifteenth amendments" (J.S. App. 49b). On the issue of intent, the court found that the at-large system was enacted in 1876 for

the express purpose of excluding blacks and those sympathetic to black interests from being represented on the Board (*id.* at 21b). The court also found that the at-large system has been maintained by the County for racially discriminatory reasons (*id.* at 31b-41b). Finally, the court found that the at-large system continues to have a discriminatory effect on black voters and candidates in the County (*id.* at 23b). Based on these determinations, the court held that the Board's at-large system violated the Fourteenth and Fifteenth Amendments of the Constitution and Section 2 of the Voting Rights Act (J.S. App. 55b). Accordingly, the court enjoined the County from conducting future elections for members of the school board under the at-large system (*id.* at 57b).

The court of appeals affirmed (J.S. App. 1a-9a). It concluded that the district court had properly found that the 1876 Act, which created the at-large electoral system, had been adopted "by a legislature whose primary goal was the eradication of the advances made by the reconstruction governments to provide equal rights for blacks" (*id.* at 8a). Thus, it was reasonable to conclude that the legislature acted with the purpose to eliminate the 1870 electoral scheme, solely because it had permitted blacks to be elected to the Board, and to adopt a new scheme that would deny blacks similar access to the political process (*id.* at 2a, 9a). In addition, the court of appeals held that the district court's finding, that the at-large scheme has a continuing discriminatory effect, was not clearly erroneous (*id.* at 6a-9a).[2]

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[2]Following the district court's decision, Congress amended Section 2 of the Voting Rights Act of 1965 to prohibit voting practices that "result" in discrimination, regardless of their purpose. Pub. L. No. 97-205, 96 Stat. 131. The United States argued in the court of appeals that this amendment provided an additional ground for affirming the district court's judgment. Since it found ample evidence to support the district court's findings on the constitutional question, the court of appeals declined to decide the Section 2 issue (J.S. App. 7a & n.5).

ARGUMENT

In *Rogers* v. *Lodge*, No. 80-2100 (July 1, 1982), this Court reiterated that at-large election systems, while not unconstitutional per se, violate the Fourteenth Amendment "if 'conceived or operated as purposeful devices to further racial . . . discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements of the population." Slip op. 4 quoting *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971). Appellants do not, and cannot, contend that the district court failed in any way to apply this proper legal standard. Instead, their challenge is limited solely to the district court's findings, upheld by the court of appeals, that the County's at-large system was adopted in 1876 and has been maintained since with a discriminatory purpose and has a continuing discriminatory effect. Essentially, appellants ask this Court to reweigh the evidence presented on these questions and come to a conclusion different from that reached by the two lower courts.

Obviously, such factbound issues ordinarily do not present questions warranting plenary review by this Court.[3] Review is also inappropriate in this case because appellants' contentions fail to show that the courts below erred.

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[3]As this Court emphasized in *Rogers* v. *Lodge*, slip op. 10, the question of discriminatory intent is a "pure question of fact" and therefore a finding that officials acted with such intent may be overturned on appeal under Rule 52, Fed. R. Civ. P., only if it is clearly erroneous. That same limited scope of review applies to the district court's finding of discriminatory effect. Cf. *City of Lockhart* v. *United States*, No. 81-802 (Feb. 23, 1983), slip op. 7, n.8,10. This Court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967), quoting *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); see also *Rogers*, slip op. 10.

1. Appellants first contend (J.S. 7-8) that the district court erred in focusing on the 1876 Act, because that statute provided for nine commissioners elected at-large (instead of the current five) and had a residency requirement of sorts for two of the positions, which no longer exists. Appellants assert that the relevant statute governing elections in Mobile County was passed in 1919 and was adopted without any intent to discriminate. But, as the district court found, the feature of the 1876 plan that was intended to impair the voting strength of blacks was the at-large scheme. Since the 1919 Act simply reduced the number of commissioners, it did not change the offending feature of the prior Act in any way (J.S. App. 21b-22b). Cf. *Beer* v. *United States*, 425 U.S. 130, 138-139 (1976). Accordingly, the at-large feature of the current system can ultimately be traced to the 1876 Act, and the district court was clearly correct in focusing on the state legislature's intent in 1876.[4]

Appellants argue (J.S. 8-13) that, even if the courts below correctly held that the legislature's intent in 1876 was controlling, the courts clearly erred in finding that the 1876 legislature intended to discriminate against blacks in adopting the electoral scheme for Mobile County. Appellants claim that the only evidence of discriminatory intent was a

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[4]Appellants argue alternatively (J.S. 8) that if the 1919 Act is not the relevant one, then an 1826 Act of the legislature, which first adopted an at-large scheme for county school commissioners, should be the focus of the discriminatory intent issue. Since blacks could not vote in 1826, obviously that statute was not enacted to deny them access to the political process. This argument ignores the fact that the 1826 Act was effectively repealed by an 1843 statute, which provided for a system of appointing commissioners (J.S. App. 8b). While an 1852 statute temporarily restored the at-large system, that system, in turn, was replaced during Reconstruction, first by an appointive system and then by a limited vote system (*id.* at 8b, 11b, 17b-18b). Thus, only the enactment of the 1876 Act restored a pure at-large election system to Mobile County. Accordingly, it was appropriate for the district court to examine the intent underlying the 1876 Act.

comment in a single newspaper article, which they claim was itself improperly relied upon by the district court.

Appellants disregard, however, the overwhelming historical evidence cited by the district court that permits an inference of discriminatory intent. In 1870, the State Board of Education changed the method of selecting Mobile County school commissioners from an appointed system to an elected system. The State School Board created 12 elected positions, but on the ballot to elect the 12 commissioners, the voters were limited to voting for nine on any one ballot (J.S. App. 18b). As a consequence, in the election of March 1871, three Republicans were elected, including one who was not white (*id.* at 19b). The Mobile Register described the purpose of this law as "being to secure to the minority a representation in affairs wherein they are interested" (J.S. App. 18b), which the district court interpreted as referring "to black voters or black voter interests" (*ibid.*).

Shortly thereafter, Democrats recaptured control of the State on a campaign promise to restore white supremacy (J.S. App. 20b). In 1876, the Democratic-controlled legislature reestablished a pure at-large system, eliminating the limited vote provision that had enabled blacks to elect commissioners (*ibid.*). The effect of the change was to insure that no black, or white identified with black interests, could be elected to the Board (*id.* at 20b, 53b). The change was made in the same year that the state legislature adopted a series of measures harmful to black interests; and the new electoral system was consistent with the Democrats' announced plan to eliminate black political influence throughout the State (*id.* at 20b).

Plainly, the district court's finding of discriminatory intent was not, as appellants contend (J.S. 11-12), dependent solely upon a newspaper article. The decision was based on a careful assessment of all the historical evidence. Based

on that evidence, the district court was warranted in finding that the 1876 Act was the product of racially discriminatory intent. Indeed, as the district court found, on this record, "no other conclusion is reasonable or possible" (J.S. App. 21b).[5]

2. Appellants argue (J.S. 13-14) that the district court erred in finding that the at-large election system has been maintained with an intent to dilute minority voting strength. They claim that the findings below were inadequate because the court failed to find that the County Board was unresponsive to black needs or interests and because the court failed to focus on the state legislature's intent. The district court's finding of discriminatory purpose is, however, fully supported by the record.

There was extensive evidence that the Board has long been unresponsive to minority needs. From the enactment of the at-large system in 1876 until this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Board spent far less per pupil on the education of its black students than it spent on its white students (J.S. App. 31b-32b). After this Court's decision in *Brown*, the all-white Board repeatedly defied numerous court orders to desegregate the schools in Mobile County (*id.* at 33b). Maintenance of a segregated school system for decades after it was declared unconstitutional and even in the face of court orders to change is at least as compelling on the issue of unresponsiveness as the indirect evidence of infrequent black

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[5]Appellants contend (J.S. 12) that the district court "ignore[d]" several non-racial explanations for the 1876 Act. But appellants' argument does no more than indicate why new legislation was passed; it does not explain why the legislature adopted an electoral system that would eliminate the preexisting representation blacks had enjoyed on the school board. In fact, there is not a shred of evidence that the reasons cited by appellants entered into the decision to shift from the limited vote system to the pure at-large system.

appointments and poorly paved roads that this Court relied upon in *Rogers* v. *Lodge, supra.*

Moreover, there was more recent and direct evidence that the Board had acted to maintain the discriminatory at-large system. In 1975, the Board had successfully challenged in state court a single-member district bill which had been enacted by the State legislature (J.S. App. 34b-35b). The Board's challenge was based on the asserted illegality of an amendment to the bill that the Board itself had secured (*id.* at 34b). What is more, while the Board had publicly stated that it would remain neutral in the state court proceeding, it vigorously attacked the bill in the pleadings it filed (*id.* at 34b-35b). The district court was therefore clearly warranted in concluding that the Board's opposition to this bill was "motivated by an intent to maintain the at-large system for the purpose of denying blacks a voice in the operation of the county's school system" (*id.* at 38b).[6] The evidence is at least as strong here as in *Rogers* v. *Lodge, supra,* that the Board had maintained the at-large system in Mobile County in order to dilute black voting strength.[7]

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[6]The Board claims that the district court erred in focusing on the Board's intent. But the district court found that the Board was "so connected by the policy-making process * * * that [its] intent is relevant, if not crucial to the enactment or failure of a [districting] bill" (J.S. App. 41b). In light of this finding, which appellants have not challenged, the Board's intent was clearly a proper subject of judicial inquiry.

[7]The court cited the Board's action in connection with a second single-member district bill as further evidence of discriminatory intent (J.S. App. 35b-37b). Following the introduction of this bill in 1976, the Board moved to delay district court proceedings (*id.* at 35b). In support of its request, the Board represented to the court that, unlike the previous bill, this new bill would satisfy state constitutional standards (*id.* at 36b). After the close of trial, however, the Board's attorney conceded that, if the new bill had been enacted, it would also have been unconstitutional (*id.* at 36b). The district court found the Board's conduct "similar to the lack of cooperation and dilatory practices that

3. Finally, appellants contend (J.S. 14-19) that the district court clearly erred in holding that the at-large system continued to have a discriminatory effect on black voting strength. This contention is without merit.

The undisputed evidence shows that, from the time of the adoption of the at-large system in 1876 until the district court enjoined its operation in 1976, no black or white identified with black interests was ever elected to the Board (J.S. App. 23b, 53b). Thus, throughout its 100 year history, the at-large system served precisely the purpose it was designed to serve.

The Board asserts (J.S. 18) that times have changed and that blacks can now elect candidates of their choice under an at-large system. But the district court found that the very factors that historically have prevented blacks from electing candidates under an at-large system still exist today. The court specifically referred to the uninterrupted pattern of racial bloc voting in Mobile County that has continued to the present (J.S. App. 24b). The court also cited evidence that lingering effects of past discrimination in voting, education, housing and employment persist and dramatically limit the ability of blacks in Mobile County to participate effectively in the political process (*id.* at 24b-30b). Given

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the [Board] had displayed in opposing and obstructing school desegregation" (*id.* at 36b-37b).

The district court also cited as further evidence the Board's deliberate effort to diminish the influence of the two black Board members who were elected from single-member districts, pursuant to the district court's initial remedial order (*id.* at 38b-41b). The court found that, after the two black members were elected, the Board adopted new policies which were admittedly designed to prevent the two new members from combining with a third member to override prior Board policies (*id.* at 38b-39b). The court found that "[a] more clear intent to purposefully maintain a racially discriminatory system would be difficult to imagine" (*id.* at 41b).

these facts, the district court was fully justified in finding that the at-large system, if not enjoined, would continue to have a discriminatory effect.[8]

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[8]The record evidence cited by the Board (J.S. 16-17) does not render clearly erroneous the findings of the district court. The election of one black candidate in each of two small communities is far from compelling proof that blacks have a realistic opportunity to elect candidates sympathetic to their views in countywide elections. The Board's factual assertions regarding races for judicial positions in 1982 (J.S. 17-18) obviously were not before the district court, which rendered its judgment in 1981, and therefore we have no way of assessing the significance attributed to them by appellants. Nevertheless, even two additional isolated examples do not diminish the substantial evidence that supports the district court's findings on this point.

This case need not be held pending this Court's decision in *Escambia County* v. *McMillan*, prob. juris. noted, No. 82-1295 (Apr. 18, 1983). Although one of the issues presented in that case is whether there is sufficient evidence to support the lower court's findings of purposeful vote dilution, the proof in that case is markedly different from the proof involved here. In *Escambia County*, the district court made no finding that the at-large system was adopted with discriminatory intent, and its finding of discriminatory maintenance rested primarily on its analysis of the factors set forth in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd on other grounds, *sub nom. East Carroll School Bd.* v. *Marshall*, 424 U.S. 636 (1975). The question raised by appellants in *Escambia County* is whether the district court improperly used the *Zimmer* factors to infer purposeful discrimination. In contrast, the district court in this case found purposeful discrimination in both the adoption and maintenance of the at-large system; its findings do not rest primarily on an analysis of the *Zimmer* factors, and the Board raises no legal issue concerning the district court's use of those factors. Thus, even if this Court were to reverse in *Escambia County*, it is most unlikely that the decision would have any effect on the proper disposition of this case, because of the overwhelming direct evidence of purposeful discrimination by the County Board.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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